

With this observation I respectfully agree, although as the learned Deputy Public Prosecutor very properly stated that case did not resemble this case at all in degree—it was a more serious case involving stabbing. The learned Magistrate in deciding the sentence stated as follows:—

"I formed the opinion that the very fact that this soldier had been convicted in a Magistrate's Court in this case would in itself tend to deter him from committing further similar offences. I think I am also right in saying that it is usual for convictions in a civil Magistrate's Court to be recorded in a soldier's Record of Service, thus it may well affect his chances of promotion. I should add further that as far as I can recall this is the first case tried by me in which an Australian soldier has been convicted of assault."

I fully sympathise with the learned Magistrate and it is, in fact, extremely difficult to decide how to approach the question of the punishment of a soldier, a member of a visiting Armed Force on duty here with the express purpose of protecting the citizens of this country. The learned editors of *Halsbury's Laws of England*, 3rd edition, Volume 10 at page 487 state as follows:—

"889. Object of punishment. The object of punishment is the prevention of crime, and every punishment is intended to have a double effect, namely, to prevent the person who has committed a crime from repeating the act or omission and to prevent other members of the community from committing similar crimes."

As regards the particular offender there are three ways of providing by punishment against the recurrence of an offence: (1) by taking from him the power of offending (incapacitation); (2) by taking away the desire of offending (reformation); (3) by making him afraid of offending (intimidation).

In some cases, besides providing for the prevention of crimes in future, punishment may also include reparation for the past injury by ordering the offender to compensate the person injured.

As regards other members of the community who are disposed to commit similar offences, the only way of providing by punishment against the commission of the offence is by the deterrent effect which the punishment of an individual has upon others."

I am most concerned in considering this appeal with this last observation, namely, the question of the deterrent effect. Had the learned Magistrate considered it a perfectly trivial matter he could have dealt with the offence under section 183 of the Criminal Procedure Code, sub-section (2) of which reads as follows:—

"(2) When any person is charged before a District Court or Police Court with an offence punishable by such Court, and the Court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may, without proceeding to conviction, make an order either—

- (a) dismissing the charge or complaint after such admonition or caution to the offender as to the Court seems fit; or
- (b) discharging the offender conditionally on his entering into a bond with or without sureties to be of good behaviour and to appear for conviction and sentence when called upon at any time during such period

not exceeding three years, as may be specified in the order."

But, judging by his remarks, he clearly did not consider it trivial—and I agree. I think upon the whole the question of deterrent effect was overlooked and the Deputy Public Prosecutor was right in complaining that the fine was inadequate. It is natural that Magistrates should entertain some sympathy for serving soldiers who are in a foreign country, miles away from their homes, and all should have a very proper respect and admiration for the excellent way which the Armed Forces are performing. Nevertheless, the above considerations must also be borne in mind. In saying this I have constantly before me the axiom that in assessing punishment Magistrates and others should avoid punishments which amount to mere pin-pricks. These are merely annoying or irritating and do not correct or deter. Far better none than these. As indicated in the passage which I have quoted from Volume 10 of *Halsbury's Laws of England* they merely show that the principles underlying punishment have been misunderstood.

That being so I allow this appeal and enhance the sentence by increasing the fine to a fine of \$200. The compensation awarded by the learned Magistrate is increased by order of this Court to \$75.

Appeal allowed.

HOOI CHUK KWONG v. LIM SAW CHOO (F)

[C. A. (Thomson C.J., Hill and Smith JJ.)
October 23, 1957]

[Penang—F.M. Civil Appeal No. 19 of 1957]

Landlord and Tenant—Control of Rent Ordinance, 1948, s. 13(1)(k)—Presumption under s. 105(ii) Town Boards Enactment (Cap. 137)—Interpretation of—Exposure to prosecution—If exposure to fine, penalty or forfeiture.

Appellant had been a contractual tenant of a Chettiar on a periodical monthly tenancy for over 25 years.. In 1940 upon the coming into force of Rent and Charged Land (Restriction) Enactment No. 14 of 1940, the premises became controlled premises. In 1950 or 1951 a friend or sub-tenant of the appellant erected a cubicle without the permission of the Chairman, Town Board contrary to section 105(i) of the Town Boards Enactment. He, however, obtained the permission of the appellant and the Chettiar permitted the construction of the structure. Between January 1954 and August 1955 the Health Inspector in charge of the Town Board on various occasions inspected the premises and had reason to believe that it was an unauthorised structure but no prosecution was undertaken because of the acute housing shortage and according to him "The Department just turned a blind eye to erection of cubicles in Telok Anson". The respondent purchased the premises in March, 1955 from the Chettiar and after having obtained from the Rent Assessment Board permission to eject the appellant, instituted action for recovery of the premises. The President, Sessions Court, Telok Anson, dismissed the action. On appeal, reversing the decision of the Court below, the Judge ordered possession to be given to the respondent.

Held, on appeal to the Court of Appeal: on the facts as disclosed the respondent was not at any time "exposed

to any penalty, fine or forfeiture" within the meaning of section 13(1)(k) of the Control of Rent Ordinance.

Held further: exposure to prosecution is not enough but there must be exposure to conviction and there is no exposure to conviction unless facts exist which would support a conviction.

Judgment of Whitton J. in *Sarah Cashin v. Goh Kah Seng*⁽¹⁾ dissented from.

Cases referred to in the judgment:—

(1) *Sarah Cashin v. Goh Kah Seng* (1955) M.L.J. 52.

(2) *Tong Peng Hong v. Public Prosecutor* (1955) M.L.J. 232, 233.

COURT OF APPEAL.

S. K. Das (N. Sharma with him) for the appellant.
J. Williamson for the respondent.

S. K. Das — "Exposes" is not a term of art: means "to place in a situation unprotected" (Bouvier) or "to leave unprotected" (Ballantine): it is a question of fact "to be decided by reasonable minds upon the available evidence". *Carey v. Ocean Coal Co.* (1938) 1 K.B. 365, 375. Whitton J. in *Sarah Cashin's* case equated "exposes the landlord to any penalty, fine or forfeiture" in section 13(1)(k) with "exposes the landlord to prosecution for an offence punishable with" not warranted by the language of the section. On admitted or proved facts respondents was never exposed. She was not the owner at the time of erection of the unauthorised cubicle. She did not erect nor cause or permit it to be erected within the meaning of section 105(1) of Town Boards Enactment for she had no control over premises nor could she have forbidden its construction. *Barton v. Alliance Economic Investment Co.* (1922) 1 K.B. at p. 759: *Goodbarne v. Buck* (1940) 1 K.B. 771.

Section 105(i) creates a single offence which is completed as soon as the cubicle is constructed. Suffering or permitting continuation of unauthorised cubicle is not an offence until conviction under subsection (iii) and that only on the part of the convicted person. No vicarious or transmitted criminal liability imposed on successor-in-title.

Demolition order under subsection (vi) is neither fine nor penalty or forfeiture. *The Queen v. The Trustees of Middlesex, Re Eldson* (1881 - 82) 9 Q.B.D. 41.

Actual expenses incurred by the Chairman for demolition recoverable from the owner at any time is in the nature of debt Cf. section 20 (iii). *David v. Britannia Merthyr Coal Co.* (1909) 2 K.B. 149, 160.

Presumption under subsection (ii) does not create a new offence. *Toh Peng Hong v. Public Prosecutor* (1955) M.L.J. 232, 233.

"Owner of house" in subsection (ii) means owner at the time of unauthorised erection. *Tubb v. Good* (1869 - 70) 5 Q.B.D. 443.

Subsequent owner is not made an underwriter of the good behaviour of a stranger. *Reynolds v. G. H. Austin & Sons Ltd.* (1951) 2 K.B. 135, 149 - 151 per Devlin J.

As assignee of reversion, respondent not entitled under section 42(v) of the Land Code to succeed on a breach which took place before she became owner. *Cohen v. Tanner* (1900) 2 Q.B. 609.

Williamson — *Sarah Cashin's* case applies. Facts are identical. Respondent liable to be called upon for an explanation and liable to conviction unless she proves to the contrary under section 105(ii). The offence under subsection (i) is a continuing offence. What that section contemplates is that the landlord should not be put in jeopardy by an illegal act of the tenant or even called upon for an explanation. *Prima facie* evidence on which prosecution can be launched is sufficient. "Owner" means an owner at any time or from time to time. Ownership of house at the date of institution of prosecution is *prima facie* evidence of permission to erect.

Cur. Adv. Vult.

Thomson C.J. : — The appellant in this appeal is the tenant and the respondent is the landlord of premises at Telok Anson, which at all material times were subject to the provisions of the Control of Rent Ordinance, 1948.

So far as they are now material the facts of the case have never been in serious dispute. For many years the appellant held the premises on the usual type of monthly contractual tenancy from a landlord who sold them to the present respondent in March 1955. On 1st September, 1955, the respondent determined the appellant's tenancy by notice and after the expiration of that notice the appellant remained in occupation of the premises as a statutory tenant. On 13th December, 1955, the respondent obtained the necessary permission of the Rent Assessment Board to take ejectment proceedings and shortly thereafter the present proceedings were commenced in the Sessions Court.

In these the landlord claimed vacant possession and mesne profits and alleged that the tenant was not entitled to the protection of the Control of Rent Ordinance because he had unlawfully caused or permitted the erection of certain partitions on the premises in contravention of sections 102 and 105 of the Town Boards Enactment and thereby exposed the landlord to a penalty and because he had sub-let parts of the premises at rents exceeding in the aggregate 75% of the rent paid by him to the landlord. With regard to this second allegation of receiving such rents from sub-tenants the learned President found in fact that it was not made out and his finding on this point has not been challenged.

With regard to the allegation that the tenant had exposed the landlord to a penalty, the facts are that about six years previously a licensee or sub-tenant of the tenant with the tenant's permission and with the knowledge, and probably with the permission, of the previous landlord had erected some sort of partition on the premises without the consent of the Chairman of the Town Board. The case has been conducted by both sides on the basis that an offence under section 105 of the Town Boards Enactment was thereby committed, but there was a considerable body of evidence which the learned President accepted that in view of the policy of the Town Board at Telok Anson in relation to such matters it was extremely unlikely that anybody would be prosecuted for this offence. In the event the learned President in a judgment which I can only describe as admirable both in form and in content came to the conclusion that the case was governed by the Singapore case of *Sarah Cashin v. Goh Kah Seng*⁽¹⁾. He further held that by reason of it being extremely unlikely that the landlord would be

prosecuted he was not "exposed" to any penalty by reason of anything that had been done and accordingly gave judgment for the tenant.

Against that decision the landlord appealed and the appeal was allowed. The learned Judge who heard the appeal expressed himself as being in agreement with the judgment in *Sarah Cashin's* case, *supra*, and went on to hold that the learned President was wrong in taking into consideration the policy of the Telok Anson Town Board not to prosecute for offences of the nature in question and

"Once the landlord was liable to be prosecuted for something done or permitted by the tenant then the fetter on recovery of possession by the landlord is lifted by section 13(1)(k) and it is irrelevant that though liable to prosecution the landlord may by reason of the forbearance of the local authority, be unlikely to be prosecuted."

The judgment in the Sessions Court was accordingly set aside and there was substituted for it an order in terms as originally asked for by the landlord.

Against that decision the tenant has brought the present appeal.

The contractual tenancy having been determined the tenant was protected by section 13(1) of the Control of Rent Ordinance unless and until the landlord could bring the case within one or other of the exceptions set out in that section. The exception within which the landlord sought to bring the case was (k), which reads as follows:—

"Where the tenant or any other person occupying the premises under him has committed a breach of any provision of any Enactment or Ordinance in force in the Malayan Union relating to Municipalities, Town Boards or Sanitary Boards, or of any rule or by-law made thereunder, affecting the premises which exposes the landlord to any penalty, fine or forfeiture;"

The present case therefore turns on the interpretation of that provision.

In considering that provision there are two points to be observed. The first is that the tenant (or some person occupying the premises under him) must have committed a breach of certain laws affecting the premises. It is the tenant and not the landlord who must have committed the breach. The second point is that the breach committed by the tenant must "expose" the landlord to a "penalty, fine or forfeiture." We listened to a great deal of argument supported by quotations from a number of standard dictionaries as to the meaning of the word "expose". In my judgment much of that argument is beside the point. The word "expose" considered in isolation is probably not capable of very exact definition, particularly when used, as here, in a metaphorical sense. Its meaning must depend on the context in which it is used. In the present connection the question is, who is exposed to what and in what circumstances? The answer clearly is that it is the landlord who is exposed to "any penalty, fine

A or forfeiture" by reason of a breach of certain laws on the part of the tenant.

Except in the case of forfeiture of a house which does not arise here it is difficult to think of any circumstances in which a landlord could be liable to a penalty, fine or forfeiture except on conviction for an offence. In other words, it can be said at this stage, although this is not the end of the matter, that what is meant is not that the landlord must be exposed to prosecution for an offence but that he must be exposed to conviction for an offence.

Having reached that stage it is an easy transition to the next stage which is to say that the landlord can only be said to be exposed to conviction when facts exist which, if proved, would lead to his conviction. Any other interpretation would be vague, if not indeed meaningless, and would be capable of leading to very great absurdity. It would lead to the very absurd corollary that if false facts were alleged as true or if facts to make out some essential ingredient of an offence were alleged to exist when they did not exist the landlord would still be exposed to conviction by reason, presumably, of the possibility that the Court trying him would fail to expiscate the truth. In that sense we are all exposed to convictions and to penalties. We are all, to take an extreme example, exposed in some degree to conviction for murder and to hanging. It is possible to think of a great variety of possibilities ranging from the case of a pure fabrication to a case where there is some substantial basis for the allegation made. But where are we to draw the line? On such an interpretation the question of whether a person was "exposed" to conviction would depend not on what facts existed but on what facts were alleged to exist.

These reflections to my mind amply support the interpretation I have placed upon the paragraph, that to lose the protection of the statute the tenant must have committed an offence and that the offence, or the facts which go to make it out must be such as would, if made out in proceedings against the landlord, lead to a conviction which would in its turn lead to a penalty, fine or forfeiture.

After all, we are dealing with words in a statute, words which must be taken to be intended to convey a precise meaning. Moreover the legislature must be taken to have sufficient faith in the judicial process to assume that theoretically at any rate truth and not error shall prevail in every case.

In the present case the only offence which was alleged to have been committed was under section 105(i) of the Town Boards Enactment, which reads as follows:—

"No person shall erect or cause or permit to be erected in any house any partition, compartment, gallery, loft, roof, ceiling or other structure without having previously obtained the consent in writing of the Chairman."

On the face of that section no person is liable to any sort of conviction unless he has erected or caused or permitted to be erected some unlawful structure. In the present case the landlord did not erect the structure. It is true (or at least it may be true) that his predecessor in title permitted such an erection and he was thereby exposed to conviction. But the conviction to which he was thereby exposed was not for anything the tenant had done but for something he had done himself, for his own giving of permission.

It is argued, however, that while that may be so we should go on to read the next following sub-section which is as follows:—

"In every case the owner of the house shall be deemed to have permitted such erection until the contrary is proved."

This argument confuses facts with evidence which may or may not be true. Either the landlord permitted the erection or he did not permit it. If he did permit it he was exposed to conviction. If he did not permit it he was not exposed to conviction regardless of anything the tenant might have done. And I fail to see how that position is in any way detracted from by the existence of a purely evidential provision which may or may not lead to a correct result in any particular case. The sub-section says the owner of the house shall be deemed to have permitted the erection and then only unless he can prove the contrary. It does not say he shall be deemed to be guilty of the offence of permitting it.

I have myself dealt with provisions of this nature in the case of *Tong Peng Hong v. Public Prosecutor*⁽²⁾ where I said:—

"I would make certain observations of a general nature regarding statutory provisions of this sort which appear to detract from the force of the ordinary rule that in a criminal prosecution the onus lies upon the prosecution to prove every ingredient in the offence charged against the accused person The object of such provisions is not to create new offences. Nor is it to lead to the conviction of innocent persons. It is to ensure that the Courts should draw from certain facts, once they are proved, the inferences that experience has shewn a reasonable man would normally draw from such facts I would emphasize the point that such provisions are in truth statutory directions as to the drawing of inferences."

A fact is a fact. It exists or it does not exist. And putting aside any considerations of a metaphysical nature its existence is independent of the ease or difficulty with which it may be proved.

The considerations I have stated lead me to the conclusion that the present appeal should be allowed.

Before departing from the case, however, I should say a few words about the Singapore case of *Sarah Cashin v. Goh Kah Seng*⁽¹⁾, *supra*.

The facts in that case were to all intents and purposes the same as the facts of the present case and the provisions of the Singapore statutes involved are

A the same on all material points as the provisions of the Federation statutes with which we are concerned here. It is thus of great persuasive authority. But it is not binding on this Court and with the greatest respect for the learned Judge who decided it the course of reasoning I have stated compels me with much regret to the conclusion that this Court should not follow it. His Lordship's opinion is set out in the following passage from his judgment (at page 54):—

B "In the light then of the construction of Section 15(h)* I have favoured it follows that once the defendant had erected the unauthorised partitions the plaintiff was in the position of being deemed to have permitted the erection and so was exposed to prosecution. It is C I think true to say that in the course of events the case took the plaintiff never was in any serious danger of finding herself in the City Magistrate's Court, but that does not, I think, alter the fact that the defendant's breach did expose her to prosecution."

In my view, exposure to prosecution is not enough. There must be exposure to conviction and there is no exposure to conviction unless facts exist which would support a conviction.

D In all the circumstances of the case I would allow the present appeal with costs and would order that the order made in the High Court be set aside and that judgment be entered for the present appellant with costs here, in the Court below and in the Sessions Court.

E **Hill J.:**—I have read the judgment of the learned Chief Justice. I respectfully agree.

I only wish to add with regard to the Singapore case of *Sarah Cashin v. Goh Kah Seng*⁽¹⁾ that I too am regretfully compelled to the conclusion that it was wrongly decided. It is my view too that exposure to prosecution is not enough. There must be exposure to conviction and I do not consider that the facts of the case forming the subject matter of this appeal would support a conviction.

F **Smith J.:**—I have had the benefit of reading the judgments of my brethren with whom I agree. I have nothing to add to their judgments.

Appeal allowed.

Solicitors: *N. Sharma; Lovelace & Hastings.*

H **L. S. ATTIAS v. R. C. NON & ANOR.**

[Divorce Jurisdiction (Knight Ag. C.J.) August 28, 1957]

[Singapore—Divorce No. 51 of 1956]

Divorce—Petition for—Delay—Whether culpable—Exercise of discretion in favour of petitioner—Divorce Ordinance (Cap. 40).

I *Practice—Resumed hearing before different Judge—No conflict of evidence.*

The petitioner and the respondent were married in Singapore on November 3, 1925 under the provisions of the Civil Marriage Ordinance. In or about August 1926

* Of the Singapore Control of Rent Ordinance, 1953, now Cap. 242.